

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY
Caption in Compliance with D.N.J. LBR 9004-1(b)

NORGAARD, O'BOYLE & HANNON
184 Grand Avenue
Englewood, New Jersey 07631
Telephone No. (201) 871-1333
Counsel to 101 & Scottsdale, LLC
By: John O'Boyle, Esq. (6337)
joboyale@norgaardfirm.com

Chapter 11

In re:

Case No. 23-13359 VFP

BED BATH & BEYOND, INC., et al.

Jointly Administered

Debtors.¹

Hearing Date:

**101 & SCOTTSDALE, LLC'S LIMITED OBJECTION TO NOTICE TO CONTRACT
PARTIES TO POTENTIALLY ASSUMED EXECUTORY CONTRACTS AND
UNEXPIRED LEASES [DOCKET NO. 714]
AND RESERVATION OF RIGHTS**

101 & Scottsdale, LLC ("**101 Scottsdale**"), by and through its undersigned counsel, hereby files its limited objection to the *Notice To Contract Parties To Potentially Assumed Executory Contracts And Unexpired Leases* [Docket No. 714] (the "**Notice**"), filed by the above-captioned debtors and debtors-in-possession ("**Debtors**").

BACKGROUND

1. On April 24, 2023 (the "**Petition Date**"), Debtors filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**"), initiating the above-captioned case (the "**Bankruptcy Case**").

¹ The last four digits of Debtor Bed Bath & Beyond Inc.'s tax identification number are 4889. A complete list of the Debtors in these Chapter 11 Cases and each such Debtor's tax identification number may be obtained on the website of the Debtor's claims and noticing agent at <https://restructuring.ra.kroll.com/bbby>. The location of Debtor Bed Bath & Beyond Inc.'s principal place of business and Debtor's service address in these Chapter 11 cases is 640 Liberty Avenue, Union, New Jersey 07083.

2. On May 22, 2023, the Court entered an *Order (I) Establishing Procedures To Sell Certain Leases, (II) Approving The Sale Of Certain Leases, And (III) Granting Related Relief* [Docket No. 422] (the “**Lease Sale Procedures Order**”).

3. On June 13, 2023, Debtors filed the Lease Notice, which states that “pursuant to the Bidding Procedures and the terms of any Successful Bid, the Debtors may assume and assign to the Successful Bidder the contract or agreement listed on **Exhibit A** to which you are a counterparty, upon approval of the Sale Transaction.” Lease Notice, p. 2 (emphasis in original).²

4. Exhibit A to the Notice includes 101 Scottsdale’s *Lease Agreement* with Bed Bath & Beyond Inc. (the “**Lease**”) for property located at 7000 E. Mayo Blvd., Building 12, Phoenix, Arizona with a listed cure amount of \$21,295.97. *See* Lease Notice, Ex. A (line 2).

LIMITED OBJECTION

5. 101 Scottsdale does not dispute the cure amount listed in Exhibit A to the Notice (the “**Cure Amount**”).

6. Nevertheless, if the Lease is to be assumed or assumed and assigned, Debtors or the assignee should be required to pay the Cure Amount in accordance with Section 365(b) of the Bankruptcy Code, together with any other amounts accruing under the Lease between the date of this filing and the date that the Lease is actually assumed or assumed and assigned.

7. In addition to cure costs, 101 Scottsdale is entitled to adequate assurance of future performance by any assignee under Section 365(f)(2)(B) of the Bankruptcy Code. As a shopping center lease, this also requires satisfaction of the provisions of Section 365(b)(3), which requires adequate assurance:

(A) of the course of rent and other consideration due under such lease, and in the case of an assignment, that the

² Capitalized terms used but otherwise undefined herein shall have the meanings given to them in the Court’s *Order (I) Approving The Auction And Bidding Procedures, (II) Approving Stalking Horse Bid Protections, (III) Scheduling Bid Deadlines And An Auction, (IV) Approving The Form And Manner Of Notice Thereof, And (V) Granting Related Relief* [Docket No. 92] (the “**Bidding Procedures Order**”).

financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

- (B) that any percentage rent due under such lease will not decline substantially;
- (C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement related to such shopping center; and
- (D) that assumption of assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

11 U.S.C. § 365(b)(3).

8. 101 Scottsdale objects to the extent any proposed assignment of the Lease fails to comply with any of the foregoing requirements under Section 365(b)(3) of the Bankruptcy Code.

RESERVATION OF RIGHTS

9. 101 Scottsdale further reserves the right to amend and/or supplement this objection. Further, while the Lease Sale Procedures Order is not referenced in the Notice, 101 Scottsdale further reserves all rights with respect thereto. All objections and reservations asserted herein apply with equal force to any proposed sale, assumption, or assignment under the Lease Sale Procedures Order, to the extent applicable.³

³ Counsel for 101 Retail contacted counsel for Debtors regarding Debtors' *Notice Of Selection Of Stalking Horse Bidder* (the "**Stalking Horse Notice**") [Docket No. 708] selecting Overstock.com, Inc. ("**Overstock**") as the Stalking Horse Bidder for certain Acquired Assets defined in the attached Stalking Horse Agreement. Debtors' counsel represented that 101 Scottsdale's Lease was *not* one of the Acquired Assets being sold through the Stalking Horse Agreement and based on that representation 101 Scottsdale did not object to the Stalking Horse Notice. To the extent that this representation proves incorrect, 101 Scottsdale reserves the right to object to the Stalking Horse Notice.

CONCLUSION

WHEREFORE, 101 Scottsdale respectfully requests that the Court sustain this limited objection by conditioning assumption and assignment of the Lease on: (1) payment to 101 Scottsdale of the Cure Amount, plus any other amounts accruing under the Lease between the date of this filing and the date that the Lease is actually assumed or assumed and assigned; and (2) provision of adequate assurance of future performance, including, without limitation, as required by Section 365(b)(3) of the Bankruptcy Code and grant any other and further relief as the Court may deem appropriate.

Dated: June 23, 2023

/s/ John O'Boyle
John O'Boyle, Esq.